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No. 841

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

COUNTRY MUTUAL INSURANCE COMPANY, Bloomington, Illinois, (Defendant-Appellant),

Petitioner,

vs.

GUSTAV ANDEEN, Administrator of the Estate of Gustav K. Andeen, deceased; CONSTANCE ANDEEN, Executor of the Will of August Robert Carlson, Deceased, (Plaintiffs-Appellees),

Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Illinois

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Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Illinois

To The Honorable, The Chief Justices and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Country Mutual Insurance Company, Bloomington, Illinois, (Appellant-Petitioner in the Supreme Court of Illinois, below) respectfully shows unto the Court:

This is a Petition for Writ of Certiorari to the Supreme Court of the State of Illinois to review a decision and judgment made and entered in said Court on September 22, 1966, whereby said Court denied your Petitioner's Petition For Leave To Appeal from a decision and judgment theretofore entered in the Appellate Court of Illinois, Third District (Klingbiel, C.J., and Hershey, Schaefer, House, Solfisburg and Underwood, JJ, sitting).

OPINIONS DELIVERED IN THE COURTS BELOW

This action was brought by the Respondents in the Circuit Court of the Fourteenth Judicial Circuit of Illinois, Rock Island County, Illinois, under an "Uninsured Motorist" clause in an automobile insurance policy effective August 9, 1963, issued by your Petitioner, in which policy the Respondent's decedent, Gustav K. Andeen, was the named insured. Plaintiffs (Respondents here) were awarded judgments in the total sum of $76,300. This Defendant appealed to the Appellate Court of Illinois, Third District, by Notice of Appeal and the judgments were affirmed. That decision is reported in 70 Ill. App. (2d) 357; 217 Northeastern Reporter (2d) 814 (1966). Petition for Leave to Appeal to the Supreme Court of Illinois was filed. That Court, without written opinion, denied this Petition September 22, 1966. Appended to the instant Petition for Certiorari is a copy of the Opinion of the Appellate Court of Illinois delivered upon the rendering of the judgment of that Court. There was no opinion filed in the Supreme Court of Illinois; denial of Petition for Leave to Appeal was by order only. There were no other opinions of any courts or administrative agencies.

JURISDICTIONAL GROUNDS

The jurisdiction of this Court is invoked on the ground that the decision of the Supreme Court of Illinois, denying your Petitioner's Petition for Leave to Appeal to that Court, violates the Due Process and Jury Trial Guarantee clauses of the Constitution of the United States of America in that it, for the first time in this case, placed your Petitioner in the position of being deprived of its property without due process by over-riding your Petitioner's right, under its insurance policy, to arbitration and further by ratifying judgments below based upon factual findings without protecting your Petitioner's right to jury trial pursuant to jury demand duly filed. Respondent will contend that these constitutional questions were waived when the present Petitioner appealed to the Appellate Court of Illinois. This is not true because the Federal Constitution questions did not arise until the Supreme Court of Illinois entered its Order on September 22, 1966, rejecting your Petitioner's Petition for Leave to Appeal to that Court.

JUDGMENT SOUGHT TO BE REVIEWED

The judgment of the Supreme Court of Illinois, denying your Petitioner's Petition for Leave to Appeal, was entered September 22, 1966 (Page 672, Transcript).

STATUTORY PROVISIONS CONFERRING JURISDICTION

The decision of the Supreme Court of Illinois is repugnant to the following provisions of the Constitution of the United States of America in that it deprives this Petitioner of its property without due process of law and it also denies this Petitioner its right to jury trial:

Amendment (V) of the Constitution of the United States, is:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty or property, without due process of law;* nor shall private property be taken for public use, without just compensation. (Emphasis added)"

It is also provided by Amendment (XIV) of the Constitution of the United States, in part, as follows:

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Amendment (VII) of the Constitution of the United States also is:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

QUESTION PRESENTED FOR REVIEW

Does the judgment of the Supreme Court of Illinois, ratifying the judgment of the Appellate Court of Illinois, Third District, by refusing to review it, deprive the Petitioner of its rights under the United States Constitution by (1) denying its contractual right to arbitration under the provisions of the policy of insurance and forcing it to pay the judgments returned without protecting its right to arbitration and without its written consent to the underlying damages action, in accordance with the provisions of the insurance policy in violation of the Due Process Clauses; and (2) by approving judicial findings of fact without a jury verdict, notwithstanding the Respondent's jury demand?

PERTINENT CONSTITUTIONAL PROVISIONS

The decision of the Supreme Court of Illinois is violative of the following constitutional provisions, *viz*:

Amendment (V) of the Constitution of the United States, is:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty or property, without due process of law;* nor shall private property be taken for public use, without just compensation. (Emphasis added)"

It is also provided by Amendment (XIV) of the Constitution of the United States, in part, as follows:

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person without its jurisdiction the equal protection of the laws."

Amendment VII of the Constitution of the United States also is:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATEMENT

Beginning August 9, 1963, and for a term of one year thereafter, the Respondent issued an automobile insurance policy to Gustav K. Andeen (Page 66, Abstract; 508 Transcript). It included Section II, entitled "Protection Against Bodily Injury by Uninsured Vehicles" as follows (Page 76, Abstract; 518, Transcript):

> "Coverage U—Damages for Bodily Injury Caused by Uninsured Vehicles
>
> "To pay all sums which the Insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an Uninsured Vehicle because of bodily injury, including death, resulting therefrom, hereinafter called 'bodily injury', sustained by the Insured, caused by accident and arising out of the ownership, maintenance or use of such Uninsured Vehicle; * * * "
>
> "Exclusions Under Section II
>
> "This policy does not apply under Section II:
>
> "(1) to bodily injury to, or death of an Insured with respect to which such Insured or his representative shall, without the written consent of the Company, make any settlement with or prosecute to judgment any action against any person or organization who may be legally liable therefor;" (Abst. 79.)
>
> * * *
>
> "Action Against the Company
>
> "No action shall lie against the Company until after full compliance with all terms of this Section.
>
> "Arbitration
>
> "If any person making claim hereunder and the Company do not agree that such person is legally entitled to recover damages from the owner or operator of an

> Uninsured Vehicle because of bodily injury to the Insured, or do not agree as to the amount of payment which may be owing under this Section, then, upon written demand of such person or upon written demand of the Company, the matter or matters upon which such person and the Company do not agree shall be settled by arbitration in accordance with the rules of the American Arbitration Association, * * *".

During the term of the policy the insured vehicle was involved in a collision with another vehicle driven by a motorist who had no automobile insurance. The Respondent's insured, Gustav K. Andeen, and another person in the car, August Robert Carlson, were killed. (Pages 51 and 59, Abst.; 493, Transcript). Negotiations took place between the Respondent's claimsmen and the attorneys for the Estates of the Deceased (Page 65, Abst.; 507, Transcript). Although certain benefits were paid under other provisions of the policy (Page 66, Abst.; 508, Transcript), the questions concerning liability coverage claimed for these deaths were not resolved. Suits were filed (Page 13, Abst.; 455, Transcript). The attorneys for the Estates on September 14, 1964, wrote the following letter to the Respondent:

> "Enclosed please find copies of complaint which we have this day filed in the Rock Island County Circuit Court, and which arise out of the collision between your insured, Gustav Andeen, and John Roxlau at 30th Street and 31st Avenue, Rock Island, Illinois, on September 22, 1963. According to our information, Mr. Roxlau did not have any insurance."

The Respondent did not reply.

A Supplemental letter renewing the first was sent to the Respondent October 16, 1964 (Page 16, Abst.; 458, Transcript). The Respondent again elected not to answer.

The Complaint, copies of which were tendered to Respondent with the first letter, contained a jury demand. October 30, 1964 the uninsured motorist, who was the named defendant, was defaulted, plaintiffs, Respondents here, withdrew their jury demand, hearing on damages only was had and the maximum authorized under the Illinois Statute on wrongful death, $30,000., plus other recoverable items, was ultimately returned in favor of either Estate. Execution was returned "Not Satisfied" March 3, 1964 (Page 61, Abst.; 503, Transcript). The next day the Plaintiffs sued this Petitioner for $60,000., the total of the judgments for the deaths (Pages 1-4, Abst.; 443, Transcript). This Respondent moved to dismiss (Page 19, Abst.; 461, Transcript) and its Motion was denied and it filed a Demand for Arbitration under Section II, "Exclusions, etc.", of the Policy. It also filed a jury demand and an answer and affirmative defenses (Page 22, Abst.; 464, Transcript). It alleged its election not to answer the letters was not a waiver of the policy provision and was not a "written consent"; that the judgments were recovered against the uninsured motorist in violation of the written consent clause and were not binding on the Respondent; and, alternatively, that the arbitration demand it had presented should be honored.

Over the Respondent's protest, trial was had without a jury (Page 55-57, Abst.; 497, Transcript). The undisputed evidence also showed that a representative of the Respondent told the attorneys for the Estates that the Respondent would not approve the filing of the damages action against the uninsured motorist (Page 66, Abst.; 508, Transcript) and that it did not give written consent, as contemplated by the policy (Page 114, Abst.; 556, Transcript).

No arbitration was held (Page 114, Abst.; 556, Transcript).

In its Answer, filed after its Motion to Dismiss the Complaint had been denied, this Petitioner, in the Circuit Court, interposed immediately its jury demand along with its affirmative defenses (Page 22, Abst.; 464, Transcript). This injected implicitly the jury guarantee provisions of Amendment (VII) of the Constitution of the United States. The constitutional rights of this Petitioner, therefore, under the Federal Constitution, were asserted unmistakably in its first pleading on the merits in the trial court. It is recognized that the right to a jury trial is confined to those areas in which such trial was properly afforded at the time the Amendment guaranteeing such right became part of our basic law. Where damages are claimed, it is peculiarly within the purview of the right to trial by jury. Moreover, the contractual covenant entered into when the named insured, Gustav Andeen, accepted the policy of insurance (Page 66, Abst.; 508, Transcript) gave the present Petitioner the right to arbitration. This right is not circumscribed by any requirement as to time and this Petitioner, as Defendant in the Circuit Court, asserted this right at the time it filed its first pleading on the merits in its Third Affirmative Defense (Page 26, Abst.; 468, Transcript). The property rights of this Petitioner were contractually protected by the arbitration provisions of the policy and the judgments of all three courts of Illinois, including the Supreme Court of that State to which Certiorari is now sought, denied this Petitioner its right of arbitration. The rationale that it was not filed on a timely basis does not supply the element of due process in depriving this Petitioner of its constitutionally guaranteed property rights. The right to

peaceable enjoyment of one's property and protection against being deprived of it without due process of law are assured by the Fifth and Fourteenth Amendments to the Federal Constitution. Furthermore, the right to trial by jury is guaranteed by Seventh Amendment. The Trial Judge in the Circuit Court of Rock Island County erroneously held that no issues of fact were involved and tried the case without the jury over the objection of this Defendant (Pages 55-57, Abst.; 497, Transcript). There were serious questions of fact. Included were whether the demand for arbitration was filed on a timely basis, whether the present Petitioner (Defendant then) tacitly consented or refused to consent to the damages suit filed against the uninsured motorist and whether the amount awarded on the death claims was a correct factual measure of the losses sustained by the respective estates. The arrant refusal of the Circuit Court to set out the case for trial before a jury prejudiced this Petitioner and deprived it of its guaranteed right to trial by jury. Moreover, depriving it of its contractual right to arbitration denied this Petitioner due process of law and its present obligation to pay the sum awarded against it amounts to unconstitutional inroads upon its property.

Under the provisions of Rule 23, 1 (f), this Petitioner, therefore, raised two Federal questions in the first stage of the proceedings, *viz,* when it filed its initial pleading on the merits in the Circuit Court of Rock Island County.

In addition to the Federal right to trial by jury, this right is guaranteed by the provisions of Chapter 110, Section 64, Illinois Revised Statutes, 1963. This is conditioned upon following the statutory requirements and filing a prompt jury demand. This was complied with here. In *Rosenbaum* v. *American Surety Co.*, 11 N.Y. (2d) 310, 183 N.E. (2d) 667, it was held that a jury trial is necessary to

determine whether the opposing driver was operating an uninsured vehicle. Furthermore, a right to a determination by a jury of the reasonableness of the course of action adopted by this Petitioner with regard to the submission of the copies of the Complaint by the Attorneys for the Estate (Page 12, Abst.; 454, Transcript) likewise involved a right under the jury trial holdings of the *Rosenbaum* case. Factually, the Andeens have the burden of proving that Roxlau was operating "an uninsured vehicle." It was held in *Levy* v. *American Auto Insurance Co.*, 31 Ill. App. (2d) 157, that this is a finding of fact. And wherever a factual issue exists, and a party demands that it be resolved by jury verdict, he is entitled to a jury determination.

Although Country Mutual had demanded a jury trial, the Court proceeded to hear evidence that Roxlau was intoxicated, drove through a stop sign, and pled guilty to reckless homicide. The Court also admitted into evidence the entire report of proceedings of the plaintiffs' action against Roxlau, which includes hospital records consisting of 175 pages, testimony of a police officer based upon a police report and a blood alcohol report; Roxlau's criminal proceeding, including grand jury report, indictment, arraignment, and all proceedings including terms of probation; and coroner's inquest reciting facts of the collision and recommending that Roxlau be held on a charge of manslaughter.

Much of this evidence would be inadmissible in any proceeding. All of it was improper in this case where defendant had demanded and was entitled to both a jury trial and arbitration.

Moreover, agreements to arbitrate disputes arising in the future are valid, binding and enforceable (*Interstate Bakeries* v. *Teamsters*, 31 Ill. (2d) 317; *Davenport* v. *Proc-*

tor & Gamble Mfg. Co., 241 Fed. (2d) 511.) The enforceability of a contract to arbitrate is not peculiar to the law of Illinois nor to the Federal Judiciary, although the *Interstate Bakeries* case and the *Davenport* case demonstrate it is adopted in both of these forms. For example, in *Kirouac* v. *Healey*, 181 Atl. (2d) 634, decided in the Supreme Court of New Hampshire, the arbitration right is correlated with the "written consent" covenant of the policy. In that case, the Supreme Court of New Hampshire remarked:

> "By the terms of the policy, if the plaintiff who has brought suit against the uninsured motorist intends to seek to recover from the insurer, he will be faced with the alternative of obtaining the company's consent to judgment against the motorist, or of relying solely upon arbitration of his claim against the company. Assuming that before the entry of judgment in the pending action, consent to the action is given by the insurer so that coverage is maintained, such coverage is then still subject to the proviso that the insurer's obligation shall be determined by agreement, or failing agreement, by arbitration, which may be demanded by either party."*

The loss by this Petitioner of its constitutional right in its property, without due process, and the speciousness of the judgments below, are further demonstrated by the Courts' holding, in effect, that this Petitioner was obligated to assign a reason or give an explanation for its failure to give written consent. This is not consonant with either the obvious intention of the contract of insurance nor with judicial construction previously approved. (*Allstate Insurance Co.* v. *Charneski*, 114 N.W. (2d) (Wiscon-

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* Discussion concurring in this principle is contained in: 53 Illinois Bar Journal 401.

sin) 489; *Chernick v. Hartford Accident & Indemnity Co.*, 187 N. Y. Sup. (2d) 534. Affirmed: 8 N.Y. (2d) 756.)

The improper deprivation of this Petitioner's property without due process is further pointed up by the Courts' holding on the timeliness of the arbitration demand. There is simply no reasoning to support this conclusion. The Illinois statute specifically provides for hearing on a demand for arbitration after an action is already in a court of law. Chap. 10, § 102 (c) Ill. Rev. St. The Statute further states:

> "Any action * * * involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefor has been made under this section * * *." Chap. 10, § 102 (d) Ill.Rv.St.

In ruling on the request for arbitration the court is not to consider the merits of the arbitrable issues. (Introductory Note, Smith-Hurd Pocket Parts, Illinois Revised Statutes, 1964.) Moreover, there is no provision in the policy contract as to when the demand for arbitration shall be made. In *Niazi* v. *St. Paul Mercury Ins. Co.*, 121 N.W. 2d 349, the Minnesota court said that arbitration could be had some two and one-half years after the accident, and that law proceedings which had been instituted should be stayed pending the arbitration. In the *Niazi* case the parties discussed coverage and intermittently negotiated for settlement for some twenty-two months after the accident. The insureds then sued the insurance company in a court of law. The insurer filed a demand for arbitration which was done imperfectly since copies were not sent to the American Arbitration Association. Seven months after the action was filed, the insurance company requested a stay of proceedings to permit arbitration, and this was granted by the court. It was held that the in-

sured had not been prejudiced by any delay because the insured also retained a right to institute arbitration proceedings on his own motion at any time.

In the Federal Court it has been held that a delay of nine years in making a demand for arbitration under a contract provision therefor does not constitute *laches* sufficient to bar enforcement of the arbitration provision, even though the analogous statute of limitations allows only six years. (*Reconstruction Finance Corp.* v. *Harrisons & Grosfields Ltd.*, 204 Fed. 2d 366; Cert. den., 346 U.S. 854.)

CONCLUSION

There are other grounds which this Petitioner believes are compelling in supporting a reversal of the judgment of September 22, 1966 in the Supreme Court of the State of Illinois and of the judgments of the Appellate and Circuit Courts of that jurisdiction. These will, if this Court allows this Petition, be disclosed in the portions of the Record to be printed under the provisions of Rule 26 of the Rules of this Court at that time. At this time it is respectfully submitted that there are federal questions under the constitutional amendments guaranteeing against deprivation of property without due process of law and assuring any litigant a jury trial upon the making of a proper demand. This Petitioner's constitutional rights have been denied it and it is respectfully urged that this Court should allow this Petition and review this cause and reverse the judgment of the Supreme Court of Illinois.

Respectfully submitted,

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Attorney for Petitioner.

APPENDIX

Gustav Andeen, Administrator of the Estate of Gustav K. Andeen, Deceased, Constance Andeen, Executor of the Will of August Robert Carlson, Deceased, Plaintiffs-Appellees, v. Country Mutual Insurance Company, Bloomington, Illinois, Defendant-Appellant.

Gen. No. 65—67

Third District.

May 9, 1966.

Rehearing denied July 7, 1966.

1. Automobiles and Motor Vehicles, § 311.5*—judgment obtained without consent of insurer.

Where plaintiffs gave insurer written notice of their action against uninsured motorist, of trial time and date, requested insurer's consent to prosecution of action to judgment, and insurer had every opportunity to defend suit or to demand arbitration of matter under policy and did nothing, insurer was liable to plaintiffs for deaths and injuries from automobile accident with such motorist even though plaintiffs had obtained judgment against uninsured motorist without written consent of insurer as provided by policy.

2. Insurance, § 420*—preventing performance of conditions precedent.

Neither insurer nor any other party to insurance policy can deliberately prevent performance of condition precedent to liability, and then take advantage of such wrongful conduct to avoid responsibility under contract.

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* See Callaghan's Illinois Digest, same topic and section number.

3. Automobiles and Motor Vehicles, § 341*—failure to consent to proceed to judgment.

Where automobile insurance policy provided judgment should not be obtained by insured against uninsured motorist without written consent of insurer but did not specifically provide judgment was not binding on insurer either as to liability or amount unless entered pursuant to action prosecuted by insured with written consent of company, insurer was bound by default judgments against uninsured motorist when plaintiffs had expressly requested insurer's written consent to proceed to judgment against such motorist and insurer failed to reply.

4. Automobiles and Motor Vehicles, § 345*—arbitration clauses.

Agreements in automobile insurance policies that if any person injured by uninsured motorist cannot agree with insurer as to liability of uninsured motorist or as to amount of damages then, upon written demand of such person or of insurer, matter shall be settled by arbitration, are valid in this state.

5. Automobiles and Motor Vehicles, § 333*—judgments binding on insurer.

Under automobile insurance policy providing that if claimants and insurer do not agree as to question of liability or as to amount of payment for damages arising out of claimants' accident with uninsured motorist, then upon written demand of such persons or of insurer, matters not agreed upon should be settled by arbitration, arbitration was optional and not compulsory, so that when neither claimants nor insurer made written demand for arbitration,

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* See Callaghan's Illinois Digest, same topic and section number.

plaintiffs' judgments against uninsured motorist were binding on insurer.

6. Jury, § 22*—waiver by going to trial.

Where insurer proceeded to trial before court without objection, after requesting jury trial, such action constituted waiver of insurer's right to jury trial.

7. Automobiles and Motor Vehicles, § 311.5*—uninsured motorist coverage.

Automobile insurance policy provisions involving uninsured motorist should be liberally construed to carry into effect policy of state to give full force and effect to such provisions.

Appeal from the Circuit Court of the 14th Judicial Circuit of Rock Island County; the Hon. GEORGE O. HEBEL, Judge, presiding. Affirmed.

Donald A. Henss, of Moline, for appellant.

Lloyd A. Schwiebert, of Moline, and Eagle & Eagle, of Rock Island, for appellees.

ALLOY, J.

The cause before us involves an action by the insured, Gustav Andeen, Administrator of the Estate of Gustav K. Andeen, deceased, and Constance Andeen, Executor of the Will of August Robert Carlson, deceased, as plaintiffs against the insurer, Country Mutual Insurance Company, as defendant.

On September 22, 1963, a motor vehicle driven by Gustav Andeen in which his family was riding collided with a vehicle driven by a John Roxlau in Rock Island, Illinois. Roxlau was driving under the influence of intoxicating

*See Callaghan's Illinois Digest, same topic and section number.

liquor and ran a stop sign. Andeen's father-in-law was killed as a result of the collision. His father received crushing chest injuries which confined him to his bed until his death on May 5, 1965. The son received a deep brain injury and the daughter incurred a crushed pelvis. Blood tests taken of Roxlau showed an alcoholic content of .181. Roxlau was indicted for reckless homicide and entered a a plea of guilty.

There was no insurance on the vehicle being operated by Roxlau but Andeen was insured with defendant Country Mutual covering injuries and death caused by an uninsured motorist with limits of $30,000 for one claim and $60,000 for claims arising from one accident. This policy provided that a judgment should not be obtained against the uninsured motorist within the written consent of Country Mutual Insurance Company. The policy also provided that if any person injured by an uninsured motorist could not agree with the insurance company as to the liability of the uninsured motorist or as to the amount of damages, then the matter should be settled by arbitration "upon written demand of such person or upon written demand of the company."

Plaintiffs were unable to arrive at any settlement with Country Mutual Insurance Company. Eleven months after the collision, on August 26, 1964, the insurance company offered to settle the death claim and the three injury claims for a total of $16,000. The insurance company was advised that the case appeared to be one which would justify the payment of the limits under the policy and that the offer was so low as to make further discussion useless. All right to recover damages under the dramshop law would have expired within one year of the collision (1963 Ill. Rev. Stats., c. 43, § 135), that is, on September

22, 1964. Plaintiffs, therefore, filed suit against the uninsured motorist, John Roxlau, and also filed dramshop actions, on September 14, 1964. Plaintiffs gave Country Mutual Insurance Company written notice of the filing of the suit against Roxlau with copies of the various complaints and advised that according to their information, Roxlau did not have any insurance. The insurance company did not reply to this letter. It did not appear in the suit filed against Roxlau or defend the suit and made no written demand for arbitration. The case against Roxlau was set for hearing before the Rock Island County Circuit Court and notice of this hearing was sent to the insurance company specifically referring to the cases by number and reminding the company that plaintiffs had filed complaints in the cases and specifically setting forth that the suit against Roxlau had been set for hearing on October 30, 1964, at 2:30 p. m. and that plaintiffs would ask that judgment be entered against Roxlau and also expressly requesting the written consent of the company thereto. Again, the insurance company did not reply. It made no attempt to defend the suit nor did it ask for arbitration. It simply did nothing. At the hearing in the Circuit Court of the suit against Roxlau, evidence was presented fully both as to the circumstances of the collision and as to the damages. Following introduction of such evidence, the Circuit Court entered a judgment for Gustav K. Andeen in the amount of $45,000 and for the wrongful death of August Robert Carlson in the amount of $31,251.75.

Following the entry of such judgments, the present action was commenced as against Country Mutual Insurance Company. The insurance company filed a motion to dismiss on the ground that the judgments against Roxlau were obtained without Country Mutual Insurance

Company's consent. The motion was denied. In a memorandum opinion, the Circuit Court pointed out that Country Mutual Insurance Company had been given notice of the suit against Roxlau and of the hearing date but did nothing. The court stated that Country Mutual should either have consented to have the matter decided by the court, or if it desired arbitration, it should have demanded arbitration. Thereafter, Country Mutual Insurance Company filed an answer denying that Roxlau was intoxicated, denying that he pleaded guilty to the charge of reckless homicide, denying that plaintiffs were damaged as alleged, and denying that Roxlau was operating an uninsured vehicle. The insurance company also asked for a jury trial. The cause proceeded to trial before the court without a jury and plaintiffs introduced evidence of the circumstances of the collision and the damages including a complete transcript of the evidence presented in the original suit against Roxlau. Roxlau was called to the stand and testified that there was no insurance on the truck which he was operating at the time of the collision. The defendant insurance company presented no evidence contrary to the evidence presented by plaintiffs but called as its only witness an adjuster who testified with reference to the $16,000 offer to settle all the claims which was made some eleven months after the collision. At the conclusion of all the evidence, both plaintiffs and defendant made motions for judgment as a matter of law. The court allowed plaintiffs' motion and entered judgment against Country Mutual Insurance Company for $60,000.

On appeal in this court, defendant contends that plaintiffs did not obtain "written consent" of the insurance company to proceed to judgment as against the uninsured

motorist, as required by the policy; that the default judgment entered against the other driver did not determine the liability of plaintiffs' insurer under the policy; that the case should have been submitted to arbitration as provided in the policy; and that the trial judge should not have heard the issues of fact in face of the defendant's jury demand.

[1] The first major contention of defendant insurance company is that it is not liable because it did not consent to the entry of judgment against the uninsured motorist Roxlau. The policy provision under consideration provides specifically:

> "This policy does not apply . . . to bodily injury to, or death of an Insured with respect to which such Insured or his representative shall, without the written consent of the Company . . . prosecute to judgment any action against any person . . . who may be legally liable therefor."

In the case before us, the insurance company was given written notice of the suit as against the uninsured motorist and was also given specific written notice of the trial date and was requested to consent to the prosecution of said suit to judgment. Country Mutual Insurance Company did absolutely nothing. In Levy v. American Automobile Ins. Co., 31 Ill App2d 157, 175 NE2d 607, where an insurance policy provided, as does the policy before us, that judgment could not be obtained as against an uninsured motorist without first obtaining the consent of the company, the company arbitrarily refused to consent to such procedure and had denied responsibility under its policy. The court there stated, at page 164:

> "There was an implied promise on the part of the Insurance Company that it would not unreasonably or arbitrarily withhold its written consent. The com-

> pany gave no reason for its refusal to allow the plaintiffs to obtain a judgment against the uninsured motorist . . . Under these circumstances, the action of the company in arbitrarily withholding its written consent constitutes a violation of the implied provisions of the policy and consequently the exclusion clause is not a bar to this action."

[2] While it is true that at the time of the decision referred to, compulsory arbitration agreements were not valid under the laws of this state, the proposition for which the case is cited is still a valid precedent and neither an insurance company nor any other party can deliberately prevent the performance of a condition precedent to liability and then take advantage of such wrongful conduct to avoid responsibility under the contract.

The insurance company contention is also advanced that the judgments taken as against Roxlau are not binding on Country Mutual Insurance Company. In the case of Wert v. Burke, 47 Ill App2d 453, 197 NE2d 717, an action had been filed against an uninsured motorist and the insurance company sought to intervene on the ground that any judgment against the uninsured motorist would be binding on the company. The court in that case concluded that the judgment would be binding and permitted intervention and specifically stated, at page 456:

> "It is clear from the foregoing cases that an insurance company which insures against injuries caused by an accident which arises out of the ownership or use of an uninsured automobile is within the requirement of the intervention act as one that will or may be bound by a judgment in an action brought by the insured against the owner or operator."

[3] There is no provision in the policy before us specifically providing that a judgment entered as against an uninsured motorist is not binding upon the insurance

company either as to liability or amount as is true in some recent policies. The uninsured motorist coverage developments are referred to in the Second Annual Negligence Law Forum sponsored by the Institute on Continuing Education of the Illinois Bar 1964 (at page 25) where the author states that some companies have recently inserted a provision which specifically makes the judgment not binding upon the insurer as to the amount of damages or on the question of liability unless the judgment is entered pursuant to an action prosecuted by the insured with the written consent of the company. As we have indicated, no such provision appears in the policy before us. The judgments obtained against the uninsured motorist, under the circumstances in this case, are binding upon the defendant insurance company.

[4, 5] Returning to the question of arbitration to which we have made reference in the course of this opinion, it is clear that arbitration agreements are valid under the law of this state. It is notable that in the policy involved in this case, arbitration is optional and not compulsory. The specific clause under consideration provides that if the person making a claim under the policy and the company do not agree as to the question of liability or as to the amount of payment, "then, upon written demand of such person or upon written demand of the company" the matter or matters upon which the claimant or the company do not agree should be settled by arbitration in accordance with the rules of the American Arbitration Association. It is obvious that arbitration would only be instituted if either party makes a written demand for arbitration. It is also necessarily implied that a party desiring arbitration must demand arbitration within a reasonable time. The collision with which we are concerned occurred on September 22, 1963. The judgments were not

entered against the uninsured motorist until over a year later on October 30, 1964. Neither the claimants nor the insurance company made any written demand for arbitration during that period. The judgment thereupon became binding on the insurance company under the precedents in this state, on October 30, 1964. No demand for arbitration was made until May 10, 1965, in conjunction with the present proceeding when no issues were in fact left to arbitrate. The optional arbitration provision with which we are concerned in this case is not the type of provision which was referred to in the Second Annual Negligence Law Forum to which we have referred above (at page 25), where the author states that for the purpose of such coverage a specific provision is recently made that, where the parties do not agree, the determination as to whether the insured is legally entitled to recover damages and the amount thereof shall be made by arbitration. In such case, arbitration is automatic and compulsory and is not optional. It is not conditioned on the making of a written demand for arbitration by either party.

[6] The jury trial contention made by the insurance company is not consistent with the procedures undertaken by the insurance company in the course of the trial. Country Mutual Insurance Company proceeded to trial before the court without raising the point, which in itself would constitute a waiver of a jury trial (People v. Czaszewicz, 295 Ill. 11, 128 NE 739). There is a serious question as to whether there was any question of fact upon which a jury could pass in the case.

[7] The legislature of the state of Illinois has shown that the public policy of this state is to attempt to protect individuals from injuries and death as a result of collisions with uninsured motorists (Sobina v. Busby, 62 Ill App2d 1, 210 NE2d 769). Policy provisions involving

uninsured motorists should be liberally construed to carry into effect the policy of the state to give full force and effect to such uninsured motorist provisions. Defendant insurance company was kept fully advised throughout the proceedings before us. It received written notice of the filing of the complaint and also specific written notice of the time for the hearing in the proceeding against the uninsured motorist. The company had every opportunity to defend the suit if it desired to do so or to demand arbitration if that is what it desired. The company did nothing. It did not ask for arbitration nor did it defend the suit against the uninsured motorist. It cannot take advantage of its own failure to act in order to avoid liability under the contract of insurance.

The judgments of the Circuit Court of Rock Island County were, therefore, proper and should be affirmed.

Affirmed.

CORYN, P. J. and STOUDER, J., concur.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D., 1966

No. 841

COUNTRY MUTUAL INSURANCE COMPANY, Bloomington, Illinois,

(Defendant-Appellant), Petitioner,

vs.

GUSTAV ANDEEN, Administrator of the Estate of Gustav K. Andeen, deceased; CONSTANCE ANDEEN, Executor of the Will of August Robert Carlson, Deceased,

(Plaintiffs-Appellees), Respondents.

ANSWER TO PETITION FOR WRIT OF CERTIORARI

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ANSWER TO PETITION FOR WRIT OF CERTIORARI

STATEMENT.

Country Mutual issued its insurance policy to Gustav Andeen wherein Country Mutual insured Andeen and any occupants of his motor vehicle against injuries caused by an uninsured motorist. The policy provided that if

any person injured by an uninsured motorist and the company could not agree as to the liability of the uninsured motorist or as to the amount of the damages then "upon written demand of such person or upon written demand of the Company, the matter * * * shall be settled by arbitration". The policy also provided that no injured person should prosecute his claim to judgment against the uninsured motorist "without the written consent of the Company". (Abst. 7, 10; Rec. 449, 452)

While this policy was in force, on September 22, 1963, an uninsured motorist named Roxlau struck a vehicle driven by Andeen, killing Andeen's father-in-law August Carlson and so seriously injuring Andeen's father (Gustav K. Andeen) as to confine him to his bed until his death on May 5, 1965. Andeen's son and daughter were also seriously injured. The evidence showed that Roxlau was intoxicated and caused the collision when he ran a stop sign. He later entered a plea of guilty to reckless homicide. (Abst. 62, 63; Rec. 504, 505)

Plaintiffs were unable to arrive at any settlement with Country Mutual and any claims they had under the Illinois dram shop law would have expired within one year of the collision (1963 Ill. Rev. Stat., c. 43, sec. 135), that is, on September 22, 1964. Consequently, on September 14, 1964, plaintiffs filed their dram shop actions and also filed suit against Roxlau to recover damages for the death of August Carlson and for the injuries to Andeen's father Gustav K. Andeen.

Notice of this action was given to Country Mutual by the following letter: (Abst. 12; Rec. 454)

"Country Mutual Insurance Co.
Bloomington, Illinois September 14, 1964
Gentlemen:

Enclosed please find copies of complaints which we have this day filed in the Rock Island County Circuit Court and which arise out of the collision between your insured Gustav Andeen and John Roxlau at 30th Street and 31st Avenue, Rock Island, Illinois, on September 22, 1963. According to our information, Mr. Roxlau did not have any insurance.

Very truly yours,
Eagle & Eagle
By /s/ Edw. L. Eagle, Jr."

Country Mutual did not reply to this letter. It made no demand for arbitration under its policy and it took no steps to defend the action against the uninsured motorist Roxlau.

The suit against Roxlau was set for trial. Plaintiffs gave Country Mutual notice of the setting and asked Country Mutual's consent to proceed to judgment against Roxlau by the following letter: (Abst. 16, 17; Rec. 458, 459)

"Country Mutual Insurance Company
Bloomington, Illinois October 16, 1964
Gentlemen:

Re Andeen v. Roxlau, No. 64-L-1221
Andeen v. Baltzer, No. 64-L-1222
Andeen v. Baltzer, No. 64-L-1223

As you know, we filed complaints in the above entitled cases on September 14, 1964. I cannot recall whether I sent you copies of the summons along with the complaints, but in any event I am enclosing copies of the summons with this letter.

The suit against Roxlau has been set for hearing on October 30, 1964 at 2:30 P.M. At that time we

will ask that judgment be entered against him and we hereby request your written consent thereto.

Very truly yours,
Eagle & Eagle
By /s/ Edw. L. Eagle, Jr.
Edw. L. Eagle, Jr."

ELEJ:ls
Encs.

Country Mutual did not reply to this letter although on page 8 of its Petition it acknowledges receipt of both letters. It made no demand for arbitration under its policy and took no action to defend the suit against Roxlau.

At the hearing on October 30th plaintiffs presented evidence both as to the circumstances of the collision and as to the damages, and following the presentation of this evidence the circuit court entered a judgment against Roxlau in favor of Gustav K. Andeen in the amount of $45,000 and also a judgment against Roxlau for the death of August Carlson in the amount of $31,251.75. (Abst. 64; Rec. 506)

Thereafter, plaintiffs filed the present suit against Country Mutual. Country Mutual filed a motion to dismiss based on the ground that it had not consented to the entry of the judgments against Roxlau. This motion was denied. In a memorandum opinion the circuit court pointed out that even though Country Mutual had been given notice of the suit against Roxlau it failed to demand arbitration under its policy and also failed to defend the suit against Roxlau. (Abst. 21, 22; Rec. 463, 464) On May 10, 1965, after this ruling, Country Mutual filed a demand for arbitration and stay of proceeding which was denied by the circuit court on the ground that it came too

late and after a judgment had been entered which was binding upon Country Mutual both as to liability and damages, the two matters which had been subject to arbitration. (Abst. 52; Rec. 494)

Country Mutual then filed an answer denying that Roxlau was negligent, denying that plaintiffs were injured, and denying that Roxlau was uninsured. Country Mutual also demanded a jury trial. The cause proceeded to trial before the court without a jury and plaintiffs presented full evidence as to the circumstances of the collision and their damages. Roxlau testified that he had no insurance on the vehicle which he was operating at the time of the collision. (Abst. 57, 58; Rec. 499, 500) Country Mutual did not object to proceeding without a jury at the time the trial commenced (Abst. 50-53; Rec. 492-495) and at the conclusion of the evidence both plaintiffs and Country Mutual made motions for judgment as a matter of law. (Abst. 37, 40; Rec. 479, 482) The only evidence presented by Country Mutual was the testimony of an adjuster that he had offered to settle all claims for $16,000 some eleven months after the collision. (Abst. 64; Rec. 506) The circuit court allowed plaintiffs' motion for judgment as a matter of law and entered judgments against Country Mutual for $60,000, the limits under Country Mutual's policy. (Abst. 41; Rec. 483)

Country Mutual raised no question in the circuit court that any of its constitutional rights were violated by the denial of its demand for arbitration, nor did it raise any question under the constitution with reference to its jury demand.

Country Mutual took an appeal to the Appellate Court of Illinois, Third District. On this appeal, Country Mutual

contended that its demand for arbitration should have been allowed and also that it was error to proceed to trial in the face of its written jury demand. It raised no question that any of its rights under the federal constitution had been violated.

The Appellate Court rendered a written decision which appears in the appendix to the petition for certiorari, pages 3 through 11. In said opinion, the Appellate Court made a full and fair statement of the facts. Also, the Appellate Court answered squarely the various points raised by Country Mutual.

The Appellate Court held that Country Mutual had no right to arbitrarily refuse its consent to the entry of judgment against the uninsured motorist, on the authority of *Levy* v. *American Automobile Ins. Co.*, 31 Ill. App. 2d 157, 164; 175 N.E. 2d 607. The Appellate Court further held that if Country Mutual had desired arbitration it should have made a written demand therefor in accordance with the terms of its policy; that Country Mutual made no demand for arbitration between the date of the collision on September 22, 1963, and the date that the judgments were entered against the uninsured motorist over a year later on October 30, 1964; and that once these judgments were entered they became binding upon Country Mutual both as to the liability of the uninsured motorist and as to the damages under the authority of *Wert* v. *Burke*, 47 Ill. App. 2d 453, 456; 197 N.E. 2d 717.

As to the jury demand, the Appellate Court held that Country Mutual waived its right to a jury trial by proceeding to trial before the court without raising the point, on the authority of *People* v. *Czaszewicz*, 295 Ill. 11, 128 N.E. 739. The Appellate Court also noted that there was

a serious question as to whether there was any question of fact for a jury to pass upon. In other words, the judgments against the uninsured motorist settled any question as to his liability and as to the damages. In the subsequent suit against the insurance company the only question of fact still open was whether or not Roxlau was uninsured. On this point, Roxlau was the sole witness and he testified specifically that he had no insurance on his vehicle which would cover the injuries to the plaintiffs. (Abst. 57, 58; Rec. 499, 500) Consequently, there was no conflict in the evidence to submit to a jury.

Following the decision by the Appellate Court, Country Mutual filed a petition for leave to appeal to the Supreme Court of Illinois. The sole ground urged in the Supreme Court (pages 2 and 3 of petition for leave to appeal) was that the claims should have been arbitrated. As was true in both the circuit court and Appellate Court, no claim was made that any constitutional right was infringed by the denial of arbitration.

No point whatsoever was raised in the Supreme Court of Illinois with reference to the jury demand.

The Supreme Court of Illinois denied Country Mutual's petition for leave to appeal and Country Mutual has filed its petiton for writ of certiorari to this Court. The first suggestion ever made in this case that any constitutional questions might be involved appears in this petition for certiorari. No constitutional questions were raised or passed upon by the circuit court, the Appellate Court or the Supreme Court of Illinois.

INACCURACIES IN PETITION FOR WRIT OF CERTIORARI.

1. At pages 2 and 8 of the petition it is stated that the insured Gustav Andeen was killed in the collision. However, the insured was not even injured in the collision. His father was injured and subsequently died, as the Appellate Court correctly noted in its opinion, page 4 of appendix to petition. This error is probably due to a similarity in names.

2. At page 9 of the petition it is stated that in the suit against the uninsured motorist the circuit court heard evidence "on damages only". This is inaccurate. The circuit court heard not only the evidence on the damages but on the circumstances of the collision—the fact that the uninsured motorist ran a stop sign, was intoxicated with a blood alcohol count of .181 and later entered a plea of guilty to reckless homicide. This was properly noted by the Appellate Court in its opinion wherein it stated (page 5 of appendix to petition):—

> "At the hearing in the Circuit Court of the suit against Roxlau, evidence was presented fully both as to the circumstances of the collision and as to the damages."

3. At page 9 of the petition it is stated that the circuit court entered judgment of $30,000 plus recoverable items on both estates. This is not accurate. Judgment of $30,000 plus recoverable items was entered in favor of the estate of August Carlson, but the insured's father Gustav K. Andeen was still living at the time of the trial and the circuit court entered judgment for him to cover

his personal injuries in the amount of $45,000. These facts are accurately noted in the Appellate Court's opinion, page 5 of appendix to petition.

4. At pages 9 and 11 of the petition for certiorari it is stated that trial without a jury against Country Mutual was had over Country Mutual's protest. This is not accurate. Country Mutual proceeded to trial before the court without any protest whatsoever (Abst. 50-53; Rec. 492-495) and only after the trial had been in progress for some time did Country Mutual call the circuit court's attention to its jury demand. The facts are accurately noted in the Appellate Court's opinion (appendix to petition, page 10) wherein that Court states:—

> "Country Mutual Insurance Company proceeded to trial before the court without raising the point, which in itself would constitute a waiver of a jury trial. (*People* v. *Czaszewicz,* 295 Ill. 11, 128 N.E. 739.)"

5. At page 12 of the petition it is stated that whether or not Roxlau was uninsured was a question of fact which should have been submitted to a jury. This is not accurate. Roxlau himself was called to the stand and he testified expressly and explicitly that he had no insurance on his vehicle which would cover the injuries which he caused. (Abst. 57, 58; Rec. 499, 500) No evidence or witness whatsoever was presented to the contrary and consequently there was no conflict in the evidence to present to a jury. The Appellate Court was quite cognizant of this situation because it noted in its opinion, page 10 of appendix to petition:—

> "There is a serious question as to whether there was any question of fact upon which a jury could pass in the case."

6. At page 2 of the petition it is stated that there are "no other opinions" other than that of the Appellate Court. This is not correct, because the circuit court filed a memorandum opinion which was specifically referred to by the Appellate Court in its opinion (page 6 of appendix to petition):—

> "In a memorandum opinion, the Circuit Court pointed out that Country Mutual Insurance Company had been given notice of the suit against Roxlau and of the hearing date but did nothing. The court stated that Country Mutual should either have consented to have the matter decided by the court, or if it desired arbitration, it should have demanded arbitration."

7. At page 3 of the petition it is stated that Country Mutual was deprived of certain constitutional rights when the Supreme Court of Illinois held "for the first time in this case" that Country Mutual was not entitled to arbitration or a jury trial. This is not accurate.

The circuit court specifically denied Country Mutual's demand for arbitration on the ground that it came too late and this ruling was affirmed by the Appellate Court. If any constitutional question arose by reason of the denial of arbitration, it arose in the circuit court and Country Mutual raised no constitutional question in the circuit court and the circuit court decided no such question.

The same is true with respect to Country Mutual's jury demand. The circuit court held that Country Mutual waived its right to a jury trial by proceeding to trial before the court without a jury; that there was no conflict in the evidence for a jury to pass upon; and that both plaintiffs and Country Mutual moved that the circuit court decide the case as a matter of law. If any

constitutional question arose, it necessarily arose in the circuit court and yet Country Mutual failed to raise any such question in the circuit court and no such question was decided by that court.

The Illinois Supreme Court did not deprive Country Mutual of any constitutional rights with respect to its jury demand because in its petition for leave to appeal to the Supreme Court of Illinois Country Mutual's sole point of contention was with reference to arbitration. It made no point or contention whatsoever in the Supreme Court of Illinois with reference to its jury demand.

ARGUMENT.

The accident in question occurred on September 22, 1963, and judgment was not entered against the uninsured motorist until October 30, 1964. Under Illinois authority, this judgment was binding upon Country Mutual both as to the liability of the uninsured motorist and as to the damages. Thereafter, suit was filed against Country Mutual and Country Mutual filed a motion to dismiss on the ground that it had not consented to the judgment against the uninsured motorist. This motion was denied by the circuit court in a memorandum opinion wherein the circuit court pointed out that Country Mutual had been given notice of the suit against the uninsured motorist and had been requested to give its consent to the entry of judgment against said motorist, that Country Mutual should either have consented or it should have demanded arbitration, but it did neither. It was only after this memorandum opinion was filed that Country Mutual made its demand for arbitration (May 10, 1965) and said demand was denied on the ground that it came too late and after a binding judgment had been entered against the uninsured motorist. This ruling was affirmed in the Appellate Court, and the Supreme Court of Illinois denied a petition for leave to appeal from said ruling. No question was raised that this ruling deprived Country Mutual of any constitutional rights in the circuit court, in the Appellate Court or in the Supreme Court.

Likewise, the circuit court ruled that Country Mutual had waived its jury demand by proceeding to trial be-

fore the court without objection; that inasmuch as the undisputed evidence was that the motorist in question (Roxlau) had no insurance, there was no conflict in the evidence to submit to the jury; and all parties had invited the circuit court to decide the question by filing motions asking the court to decide the question as one of law. The circuit court's ruling on this point was affirmed by the Appellate Court and Country Mutual then abandoned the point in the Supreme Court of Illinois by confining its petition for leave to appeal solely to the matter of arbitration.

We submit that Country Mutual failed to preserve any constitutional questions which may have been involved by failing to raise such questions in the circuit, Appellate and Supreme Court of Illinois. See *Ker* v. *California*, 374 U.S. 23, 10 L. ed. 2d 726, 83 S. Ct. 1623, where the ruled is stated as follows (L. ed. 744):—

> "Ordinarily '[w]e do not reach for constitutional questions not raised by the parties,' *Mazer* v. *Stein*, 347 U.S. 201, 206, 98 L. ed. 630, 636, 74 S. Ct. 460 note 5 (1954), nor extend our review beyond those specific federal questions properly raised in the state court. The record gives no indication that the issue was raised in the trial court or in the District Court of Appeal, the latter court did not adjudicate it and we therefore find no reason to reach it on the record."

Not only is it necessary to raise a constitutional question in order to preserve said question for review, but it is also necessary to obtain a decision thereon. In the instant case, Country Mutual did neither; it raised no constitutional question in the Illinois courts and obtained no decision on any constitutional question. See *Beck* v.

Washington, 369 U.S. 541, 8 L. ed. 2d 98, 82 S. Ct. 955, where this Court stated (L. ed. pg. 109):—

> "Assuming arguendo that for the purposes of our jurisdiction the question would have been timely if raised in a petition for rehearing, not having been raised there or elsewhere or actually decided by the Washington Supreme Court, the argument cannot be entertained here under an unbroken line of precedent. E. g., *Ferguson* v. *Georgia*, 365 U.S. 570, 572, 5 L. ed. 2d 783, 785, 81 S. Ct. 756 (1961); *Capital City Dairy Co.* v. *Ohio*, 183 U.S. 238, 248, 46 L. ed. 171, 176, 22 S. Ct. 120 (1902)."

We further respectfully submit that this record presents no federal question of substance. Country Mutual failed to demand arbitration within a reasonable time. In fact it waited for over a year after the collision and until after a binding judgment was entered. When it finally did demand arbitration, there was nothing left to arbitrate. If Country Mutual had made a timely demand for arbitration prior to the time judgment was entered against the uninsured motorist, and if said demand had been rejected by the circuit court, then we would have a different situation, but these are not the facts in this case.

Likewise, with reference to the jury demand, Country Mutual proceeded to trial before the circuit court without objection, it filed a motion asking the circuit court to decide the question as one of law and, furthermore, there was no dispute in the facts presented to the circuit court and consequently nothing for a jury to pass upon. If there had been a dispute in the facts and Country Mutual had made a timely objection, we might have a different situation. But, in any event, Country Mu-

tual wholly failed to present any question as to its jury demand to the Supreme Court of Illinois.

We submit that the record in this case discloses no federal question of substance and there are no special and important reasons to grant a review on writ of certiorari, as required by Rule 19 of this Court. See *Wolf* v. *Weinstein*, 372 U.S. 633; 10 L. ed. 2d 33, 83 S. Ct. 969 (page 39 of L. ed.):—

> "Oral argument brought into sharper focus than was apparent at the time we granted the writ that the controversy over the stock interests primarily implicates questions of Pennsylvania law and presents no federal question of substance. In the circumstances, the writ of certiorari as to that judgment of the Court of Appeals is dismissed as improvidently granted. Cf. *The Monrosa* v. *Carbon Black, Export Inc.*, 359 U.S. 180, 183, 184, 3 L. ed. 2d 723, 725, 726, 79 S. Ct. 710."

Finally, we respectfully suggest that the decision below rests on adequate state grounds. See *Jankovich* v. *Indiana Toll Road Comm.*, 379 U.S. 487, 13 L. ed. 2d 439, 85 S. Ct. 493, wherein this Court stated (L. ed. page 441):—

> "It is undoubtedly '"the settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment." *Fox Film Corp.* v. *Muller*, 296 U.S. 207, 210, [80 L. ed. 158, 159, 56 S. Ct. 183].' *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 281, 7 L. ed. 2d 285, 288, 82 S. Ct. 275."

In this case, Country Mutual arbitrarily refused to consent to the prosecution to judgment of the suit against the uninsured motorist. The Illinois courts held that a

party to a contract cannot deliberately prevent the performance of a condition of the contract and then take advantage of said party's own wrongful conduct and assert the failure of the fulfillment of the condition to defeat liability under the contract. For Illinois and other authorities supporting this rule see *Levy* v. *American Automobile Ins. Co.*, 31 Ill. App. 2d 157, 164 (relied on by the Appellate Court) and also *Foreman Tr. & Sav. Bank* v. *Tauber*, 348 Ill. 280, 285; *Eggan* v. *Simonds*, 34 Ill. App. 2d 316, 320; *Goldstein* v. *Rosenberg*, 331 Ill. App. 374; Williston on Contracts, 3rd ed., Vol. 5, sec. 677, page 224; Restatement of Contracts, sec. 295; 17 Am. Jur. 2d Vol. 17, Contracts, sec. 427; 12 I.L.P., Contracts, sec. 385; 17-A C.J.S. Contracts, sec. 468.

Country Mutual made no written demand for arbitration until after judgment was entered against the uninsured motorist, more than one year following the accident. Under Illinois law Country Mutual had a right to intervene in and defend the suit against the uninsured motorist and since it failed to do so it became bound by the judgment both as to the liability of the uninsured motorist and the damages. Consequently, when it finally made its demand to arbitrate there was nothing left to arbitrate because the arbitration clause of the contract provides for arbitration only of the questions of liability and damages. For Illinois authority supporting this position see *Wert* v. *Burke*, 47 Ill. App. 2d 453; 197 N.E. 2d 717; and *Lamb* v. *Horwick*, 48 Ill. App. 2d 251; 198 N.E. 2d 194.

As to its jury demand, Country Mutual proceeded to trial before the court without objection and this constitutes a waiver of the right to trial by jury. See *People*

v. *Czaszewicz,* 295 Ill. 11, 15, 16. Since there was no dispute in the evidence for a jury to pass on, there was no error in failing to call a jury. See *Continental Ill. Nat. Bank* v. *Cardwell,* 287 Ill. App. 227, 252. Finally, since all parties moved for judgment as a matter of law the circuit court was invited to decide the matter as a question of law. See *Allen* v. *Meyer,* 14 Ill. 2d 284, 292.

As to the authorities cited in the petition for writ of certiorari, counsel cites *Rosenbaum* v. *American Surety Co. of N.Y.,* 11 N.Y. 2d 310, 183 N.E. 2d 667, as holding that the question of whether the other driver is insured should be submitted to a jury, and of course that is true where there is a dispute in the evidence. But in the case at bar the other driver was called to the stand and testified specifically that he had no insurance. Country Mutual presented no evidence to the contrary, and consequently there was no issue of fact to submit to a jury.

Counsel also cites *Kirouac* v. *Healey,* 181 Atl. 2d 634, as authority that plaintiffs should either have obtained the insurance company's consent to proceed to judgment against the uninsured motorist, or plaintiffs should have asked for arbitration. While this is correct as a general proposition, this decision is not authority that an insurance company may arbitrarily withhold its consent and thereafter defeat its liability by reason of its own arbitrary and wrongful conduct. In the case at bar, the plaintiffs gave notice of their suit against the uninsured motorist and requested the company's consent to proceed to judgment. The circuit court found that the company's failure to consent was arbitrary, and that finding was expressly affirmed by the courts of review in Illinois.

Under the authorities cited above, the company should not be permitted to take advantage of its own arbitrary conduct in order to defeat liability.

Counsel also cites *Niazi* v. *St. Paul Mercury Ins. Co.*, 121 N.W. 2d 349, and *Reconstruction Finance Corp.* v. *Harrisons & Grosfield Ltd.*, 204 F. 2d 36, to the effect that arbitration may be demanded long after the controversy arises. However, those cases are readily distinguishable from the case at bar because in neither of said cases had a binding judgment been entered at the time of the demand for arbitration, whereas the demand in the instant case was made after the entry of a binding judgment. Country Mutual was given notice of the suit against the uninsured motorist, it had a right under Illinois law to defend said suit and failed to do so, and consequently the judgment against the uninsured motorist was binding on Country Mutual both as to liability and damages. Country Mutual's demand to arbitrate, made after the entry of a binding judgment, was made at a time when there was nothing left to arbitrate.

CONCLUSION.

The petition for writ of certiorari should be denied for the following reasons:—

1. No constitutional question was raised in the courts of Illinois;
2. No constitutional question was decided by the Illinois courts;
3. No substantial federal question is involved;
4. The decision of the Illinois courts rests upon adequate state grounds.

Respectfully submitted,

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No. 841

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

COUNTRY MUTUAL INSURANCE COMPANY,
Bloomington, Illinois, (Defendant-Appellant),
Petitioner,

VS.

GUSTAV ANDEEN, Administrator of the Estate of Gustav K. Andeen, Deceased; CONSTANCE ANDEEN, Executor of the Will of August Robert Carlson, Deceased, (Plaintiffs-Appellees),
Respondents.

PETITION FOR REHEARING FROM ORDER OF THE SUPREME COURT OF THE UNITED STATES DENYING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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PETITION FOR REHEARING FROM ORDER OF THE SUPREME COURT OF THE UNITED STATES DENYING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

COUNTRY MUTUAL INSURANCE COMPANY, Bloomington, Illinois, a Corporation, Petitioner, hereby respectfully presents to the Court its Petition for Rehearing from the Order of this Court denying the Petition for Writ of Certiorari herein. Pursuant to Rule 58 of this Court, your Petitioner suggests to the Court what it believes, in good faith, to be other substantial grounds for granting the

Petition for Certiorari available to the Petitioner although not previously presented herein, as follows:

Under the provisions of the Constitution of the United States, as preserved in this Petitioner's objection to the trial of the case herein without the intervention of a jury, this Petitioner was entitled to a jury adjudication of its contractual rights.* Implicit in those rights is the principle that no state can, by legislative enactment, judicial fiat or otherwise abridge one's freedom of contract nor can any contract be thereby retroactively modified, absent some compelling public policy which over-rides the reciprocal rights and duties created by agreements between private persons.

The right of freedom of contract and the guaranty against abridgement of that right are incorporated in the following provision of the Constitution of the United States:*

> "No state shall enter into any * * * law impairing obligation of contracts * * *"

The Petitioner, as insurer, was entitled to and it is inescapable that it did take into consideration the element of risk in calculating its exposure under "Coverage U" of the policy of insurance, affording protection against losses due to the torts of uninsured motorists. This provision of contract is of great importance not only to this Petitioner but to the insurance industry. If it can be abridged retroactively by judicial decree or judgment, without due process and in violation of the jury guaranty of the Constitution, it is respectfully submitted that this Petitioner has

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* Constitution of the United States, Article I, Section 10.

not been accorded protection under the guaranty of freedom of contract in the Federal Constitution.

In the case of *Cocos* v. *American Automobile Insurance Co.*, 302 Ill. App. 442, 451, it is held that the element of risk underlies the insurance contract in all instances and inherent in the contractual rights of the insurer is that the risk he assumes will not be enlarged, since risk is the basis of all tabulated premium charges. (See also *American Automobile Insurance Co.* v. *Jones*, 45 Southwestern Reporter [2d] [Tenn.] 52, 53.) The constitutional rights of this petitioner are violated by the judgment below in that it deprives the petitioner of its guaranties in the matter of freedom of contract and this also encroaches wrongfully upon its property without due process. (See pages 5 and 6, Petition for Writ of Certiorari, filed here in this cause December 8, 1966.)

In view of these other substantial grounds available to the Petitioner, although not previously presented, this Petitioner respectfully submits that the Supreme Court of the United States should grant a rehearing and should permit the Petitioner to present to this Court the Illinois authorities in detail on oral argument before this Court. This is an important decision involving a burgeoning area of litigation under automobile insurance contracts on a broad, interstate basis and is consequential to the public as well to insurers of motor vehicles generally. We respectfully believe it warrants the full consideration of this Court.

For the reasons herein stated this Petition for Rehearing should be granted.

Respectfully submitted,
COUNTRY MUTUAL INSURANCE COMPANY
Bloomington, Illinois, a Corporation, Petitioner

By JACK E. HORSLEY
1807 Broadway
Mattoon, Illinois 61938
Its Attorney
Telephone: Area Code 217, 234-6481

CERTIFICATE OF COUNSEL

Counsel certifies that this Petition for Rehearing is presented in good faith and not for delay; further that, in fact, the judgment sought to be reviewed by Petition for Certiorari herein was actually paid in full in open Court on January 12, 1967, subject to reservation of this Petitioner's Petition for Certiorari, which was then pending and undisposed of, and any delay incident to this supplemental Petition for Rehearing would be in good faith because of the payment, satisfaction and discharge of the judgment and all interest and costs in full. Petitioner and Counsel verily believe the supplemental grounds herein stated might or could be substantial grounds available to the Petitioner, although not previously presented.

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Mattoon, Illinois
Petitioner's Attorney